

flange 100, 102 will reduce the longitudinal length of the riser 16, and the remaining bottommost flange 100 or 102 of the riser 16 may then be coupled to the rim. As each of the horizontal flanges 100, 102 are adapted for sealingly engaging the rim subsequent to any trimming of the riser which may take place, the present invention provides a riser which may be used in its initial configuration, or trimmed at a number of predetermined locations along its axial length and still remain complementally configured to mate with both the portal and the cover of the assembly. In this manner, a single riser of a standard length may be trimmed to a desired height to couple with the below-grade vessel and receive the cover thereon at or above the grade, without the necessity of having a number of risers of different lengths present at the installation site.

## ARGUMENTS

1. **The Final Rejection of Claim 1 Under § 102(b) is Internally Inconsistent, Because the Final Rejection of Claim 1 Under § 103(a) Explicitly States That the AKI Catalog Fails to Disclose All of the Limitations of Claim 1.**

As pointed out in Applicant's Appeal Brief, the AKI Catalog reference which was cited in the Final Action as anticipating the invention of claim 1 under 35 U.S.C. § 102(b), was also cited in a further rejection as rendering obvious the invention of Claim 1 under 35 U.S.C. § 103(a), in view of Jones and Hall. Regarding the obviousness rejection, the Final Action states, on page 3, as follows: "The AKI catalog discloses the invention *except for* an inwardly tapering receiving surface on the portal rim of the vessel and an inwardly tapering complementary surface on the bottommost connector portion of the riser." (Action, August 5, 2004, p. 3. Emphasis added). While this internal inconsistency was specifically raised by Applicant in its Appeal Brief, the Examiner totally ignored to even address this point. The Examiner merely reiterated this inconsistency on page 5 of the

Examiner's Answer, by repeating his admission that the AKI Catalog fails to describe the above-quoted element of claim 1. Failure of the AKI Catalog to include each and every element of claim, and the Examiner's explicit recognition thereof, proscribes the possibility that it could anticipate claim 1. It is thus respectfully submitted that the rejection under 35 U.S.C. § 102(b) rejection is in error, and should be reversed.

2. **The Examiner's Final Rejection of Claim 1 Under § 102(b) is Improper Because the Cited Art Fails to Disclose All of the Limitations of Claim 1**

Repeatedly throughout its Appeal Brief, Applicant stressed one of the points of novelty of the present claimed invention not met by the AKI Catalog, namely that the riser may be used in its initial configuration, or trimmed at a number of predetermined locations along its axial length and still remain complementally configured to mate with both the portal and the cover of the assembly. (Applicant's Brief, pages 3, 6, 9 and 10.) The following limitation reads specifically as follows:

each of said ribs including a pair of substantially horizontal flanges radially oriented in a plane transverse to the longitudinal axis of the riser and connecting said ribs to said riser wall, said flanges each being complementally sized and configured relative to said rim whereby said a circumscribing cut through one of said ribs or said riser wall adjacent said flange will reduce the longitudinal length of said riser and whereby the remaining, normally bottommost flange of the riser may be coupled to the rim in sealing engagement.

The AKI Catalog fails to disclose the at least one pair of essentially horizontal flanges, and further fails to disclose that each of these flanges are complementally sized and configured relative to the rim, whereby the rim is configured to accept in sealing engagement a cover, a riser in an initial

condition, and each complementally sized and configured flange of a trimmed riser. In the Examiner's Answer, he essentially restates the majority of the above limitation, referring to it as "a functional limitation or a process limitation". His only comments responsive to Applicant's point then conclude with the following response:

"Therefore, there is no need for the tank, riser and cover combination disclosed by the AKI catalog to actually discuss this function or this process of using and making a shorter riser. The tank, riser and cover combination disclosed by the AKI catalog *needs only to be capable of being modified by cutting the riser and modified by coupling and sealing the riser to the rim*. The AKI catalog is capable of such modification." (Examiner's Answer, page 7. Emphasis Added.)

However, as will be clearly demonstrated below, the AKI catalog is actually not capable of such modification.

FIGS. 4-6 of the present application are particularly relevant, and are reproduced below:

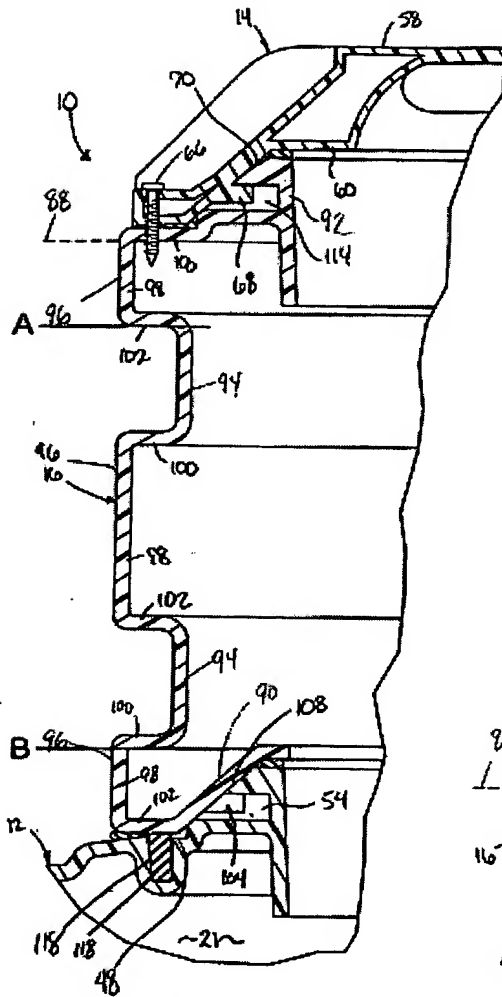


Fig. 4.

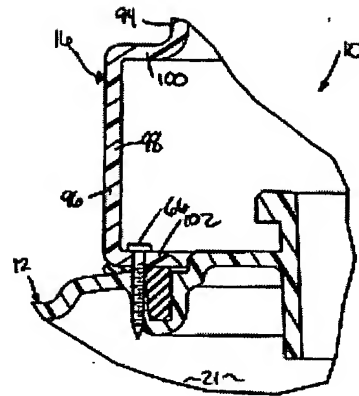


Fig. 5.

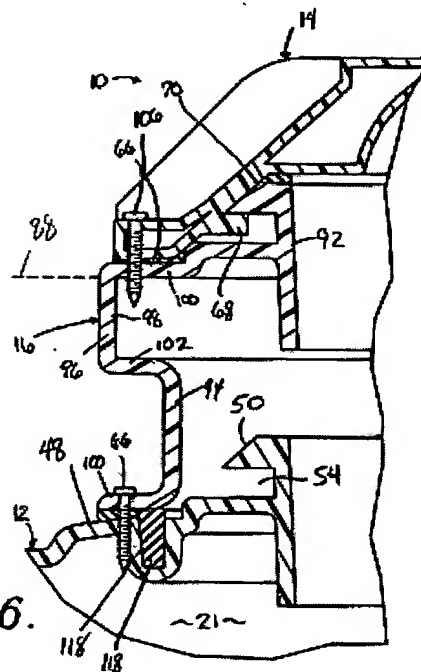


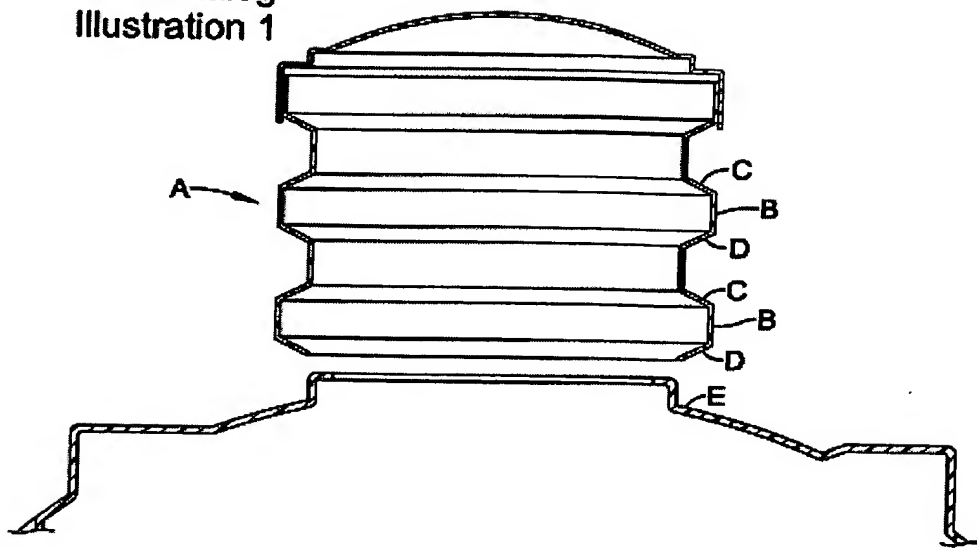
Fig. 6.

When the riser of Applicant's claimed invention is modified by cutting, each of the substantially horizontal flanges 100, 102 of ribs 96 are configured so that, after cutting, the

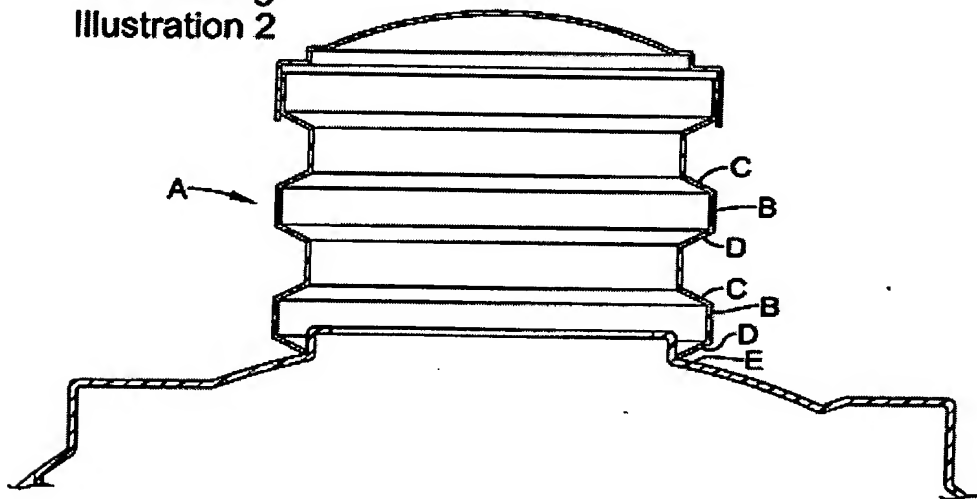
remaining bottommost flange, which can be either of the flanges 100, 102, is configured to be coupled in sealing engagement with the rim. For example, when riser 16 is modified by making a cut in the riser at line A (as illustrated in FIG. 4 above), flange 102 becomes the “remaining, normally bottommost flange.” As can then be seen in FIG. 5, this “remaining, normally bottommost flange” 102 may be coupled to the rim of the vessel 12 in sealing engagement thereto. Similarly, riser 16 can alternatively be modified by making a cut in the riser at line B (as illustrated in FIG. 4). A riser thus modified is depicted in FIG. 6, with upper flange 100 being the “remaining, normally bottommost flange”. As with flange 102, flange 100 may be coupled to the rim of the vessel 12 in sealing engagement thereto. Thus, as recited in the limitations of claim 1, each of the flanges 100, 102 extending from rib 96 are complementally sized and configured relative to the rim, so that after a circumscribing cut through a rib or riser wall adjacent to either flange 100, 102, the remaining bottommost flange 100 or 102 may be coupled in sealing engagement to the rim of the vessel.

In sharp contrast, not only does the riser of the AKI Catalog fail to disclose this limitation, it is incapable of such modification. This is best seen by reference to the following illustrations 1 and 2, which are based on the schematic representation of the septic tank depicted on page 12 of the AKI Catalog:

AKI Catalog  
Illustration 1



AKI Catalog  
Illustration 2



Specifically, the riser A includes ribs B having a pair of flanges, namely, upper flange C and lower flange D, extending therefrom. Neither of these flanges C, D are “substantially horizontal” nor are they “oriented in a plane transverse to the longitudinal axis of the riser,” as is required in claim 1.

Instead, these flanges C, D extend at an angle of approximately 45° to that longitudinal axis. Further, in order to meet the limitations of claim 1, each flange C, D of the pair of flanges would need to be able to couple with the rim E. Illustrations 1 and 2 represent the AKI riser as it would appear after modification by cutting, as suggested by the Examiner on page 7 of the Examiner's Answer. Illustration 1 shows the riser spaced from the rim, while Illustration 2 shows the riser positioned on the rim. In both of these illustrations, the riser has been modified by making a cut adjacent lower flange D, whereby flange D becomes the "remaining, normally bottommost flange" after modification. If the riser of the AKI Catalog were to anticipate claim 1, it would need to include the limitation that "the remaining, normally bottommost flange of the riser may be coupled to the rim [of the vessel] in sealing engagement." As is unmistakably apparent from Illustration 2, depicting the riser positioned on the rim E, it is physically impossible for flange D to be in complementally sealing engagement with the rim E. Thus, the pair of flanges, C and D, are not each complementally sized and configured to be coupled with the rim in sealing engagement, as is required by claim 1. Thus, not only does the riser of the AKI Catalog fail to disclose all of the limitations of claim 1, it further is not capable of being modified as required by the claims.

Thus, as all of the limitations of claim 1 are not found in the AKI Catalog, nor is the riser disclosed therein capable of the required modification, it is clear that the AKI Catalog does not, and indeed can not, anticipate claim 1 of the present invention. It is thus sincerely believed that the rejection under 35 U.S.C. § 102(b) is in error, and should be reversed.

3. **The Examiner's Final Rejection of Claim 1 Under § 103(a) is Improper Because There Is No Suggestion to Modify the Cited Art**

The foundation of the Examiner's obviousness rejection relies entirely on his erroneous

attempted modification of the AKI Catalog, as discussed above. However, the AKI Catalog fails to provide any suggestion or motivation to modify the riser taught therein by making it adjustable to accommodate differing heights, while still retaining its complemental coupling with both the cover and the rim. In the Examiner's Answer, the Examiner once again fails to show where such motivation to modify originates. The teachings of the references themselves must suggest the claimed subject matter to one of ordinary skill in the art in order to support a *prima facie* case of obviousness. See *In re Rinehart*, 189 U.S.P.Q. 143, 147 (CCPA 1976). Even if, arguendo, the reference were capable of being modified, and it clearly is not, it is not sufficient for a *prima facie* case of obviousness that the reference could be modified as proposed by the Examiner. See *In re Fritch*, 23 U.S.P.Q.2d 1780, 1783 (Fed. Cir. 1992). It is incumbent upon the Examiner to explain why the reference would have suggested to one of ordinary skill in the art the desirability of the modification. See *In re Fritch*, 23 U.S.P.Q.2d at 1783-1784. Clearly, the motivation could only have come from the teachings of the Applicant's disclosure, and such hindsight reconstruction of the reference is impermissible. See *Cardiac Pacemakers Inc. v. St. Jude Medical Inc.*, 72 U.S.P.Q.2d 1333, 1336 (Fed. Cir. 2004). The Examiner's failure to identify where the AKI Catalog suggests his proposed modification, coupled with the inability of that reference to be so modified, as described in detail above, necessitates the conclusion that the obviousness rejection under § 103(a) should be reversed.

4. **The Examiner's Final Rejection of Claim 1 Under § 103(a) is Improper Because the Cited Combination Fails to Disclose All of the Limitations of Claim 1.**

The obviousness rejection of claim 1 is based on the AKI Catalog in view of Jones et al. and Hall. In addition to dismissively disregarding Applicant's arguments regarding the lack of the AKI Catalog to disclose all of the claimed limitations, namely, a pair of substantially horizontal flanges,



oriented in a plane transverse to the longitudinal axis of the riser, each flange being complementally sized and configured relative to said rim so that, after cutting the riser adjacent one of the flanges, the remaining, normally bottommost flange of the riser may be coupled to the rim in sealing engagement, the Examiner completely neglects to even attempt to supply these missing elements from either Jones et al. or Hall. Therefore, for this additional reason, it is sincerely believed that the obviousness rejections are in error, and must consequently be reversed.

5. **The Examiner's Final Rejection of Claim 2 Under § 103(a) is Improper Because the Cited Combination Includes Impermissible Non-analogous Art, and Further Because the Cited Combination Fails to Disclose All of the Limitations of Claim 2.**

For at least the reasons set forth above, the cited combination is improper because it fails to set forth all of the elements of claim 2. In addition, the Examiner's final Office Action and Answer indicate that the Examiner has lost sight of the particular problem with which the inventor in the present application is concerned. He inaccurately states that claim 2 "has nothing whatsoever to do with an adjustable riser", and oversimplifies the problem as "securing a cover". He then adds the Wittenberg reference to the combination of the AKI Catalog, Jones and Hall references to solve that "problem".

Here, the particular problem with which the invention is concerned is to provide a subterranean tank and riser assembly comprising a vessel, cover and riser all of synthetic resin material, the tank having a portal arrangement wherein each of these components are sized and configured so that the riser can be trimmed while still retaining its complementary engagement with the cover and the rim, so as to provide the assembly with greater adaptability to height variances at the site, and to provide for a complementary fitting between the cover and the vessel or the riser. This problem further includes providing a lightweight but structurally enhanced cover. The Examiner's

statement that claim 2 “has nothing to do with an adjustable riser” is fundamentally flawed. Claim 2, as with any dependent claims, by definition includes all of the underlying features of claim 1 from which it depends.

The Wittenberg reference is clearly non-analogous art, and has been impermissibly combined in this obviousness rejection. First of all, the metal pressure cooker of Wittenberg is not within the same field of endeavor as the synthetic resin subterranean sewage tank assembly of the present invention. Further, Wittenberg is not reasonably pertinent to the particular problem with which the present invention is involved. Wittenberg is involved with the problem of securing a metal cover to a metal cooker body or pot, in a sealing arrangement designed to withstand the conditions of extreme heat and pressure. When looking for ways to solve the present problem of providing a tank assembly with a portal arrangement of adjustable height and having a cover, adjustable riser and rim which are complementally configured when the riser is in its original or trimmed condition, one skilled in the art would have no reason whatsoever to turn to references outside the field of endeavor which teach using heavy, metallic covers for cooking implements. This is particularly clear in light of the specification itself where, at page 2, lines 16-20, one problem to be overcome with the present invention is stated as providing an alternative to the tank covers known in the art and deemed unsuitable for use with the present invention, which unsuitable known covers “have traditionally been of concrete or metal which are both expensive and heavy.” *See, Asahi/America Inc. v. MFRI Inc.*, 51 U.S.P.Q.2d 1154 (D.Ct. N.Y. 1999) (One skilled in the art of thermoplastic piping systems would not look to references relating to metal piping systems.)

This combination of references completely loses sight of the problem with which the invention is concerned, and furthermore is an eclectic combination which is only suggested through

hindsight impermissively derived from applicant's disclosure. Consequently, this obviousness rejection is based on an impermissible combination of non-analogous art, and should be reversed.

6. **The Examiner's Final Rejection of Claims 3 and 4 Under § 103(a) is Improper Because the Cited Combination Includes Impermissible Non-analogous Art, and Further Because the Cited Combination Fails to Disclose All of the Limitations of Claims 3 and 4.**

The obviousness rejection of claims 3 and 4 is based on the AKI Catalog in view of Jones and Hall, and further in view of Wittenberg and Seizert et al. For at least the reasons set forth above, the cited combination is improper because it fails to set forth each and every element of claims 3 and 4. In addition, in the Examiner's Answer, the broad statement is made that "Wittenberg and Seizert are analogous because they are pertinent to the problem of securing a connection and sealing the connection." This is not, as stated above, the particular problem with which the present invention is concerned. It is, instead, concerned with a subterranean tank and riser assembly comprising a vessel, cover and riser all of synthetic resin material, the tank having a portal arrangement which is adjustable to account for height variances at the site, while retaining the complemental fitting between the cover, the riser and the rim of the vessel.

Seizert et al. is concerned with the problem of providing a locking and sealing member for use in connection with a pressurizable fuel tank for vehicles or the like. As stated above, Wittenberg is concerned with the problem of providing a metal cover for a pressurized metal cooking pot. When seeking to provide a subterranean tank and riser assembly of synthetic resin and having a lightweight cover, with the cover, riser and vessel complementally configured to achieve greater adaptability to height variances at the site, one skilled in the art would not seek references outside the field of endeavor which teach heavy, metallic covers for pressurized cooking implements, or which teach sealing

assemblies for the pressurized fuel tanks of automobiles or the like. Such references are, incontrovertibly, non-analogous art, which cannot be used to provide the claimed elements of the present invention. Thus, the obviousness rejection of claims 3 and 4 is improper, and should be reversed.

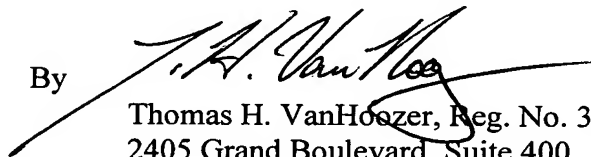
For the foregoing reasons, it is respectfully submitted that the pending claims patentably distinguish over the applied prior art and should be deemed to be allowable. Applicant thus courteously requests that the rejection of claims 1-4 be reversed and that these claims be deemed allowable.

It is not believed that a filing fee is required at this time. However, the Office is authorized to deduct any required fees which might be due in connection with this Response from Deposit Account No. 19-0522.

Respectfully submitted,

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